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Decision No. 86050

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of SOUTHERN CALIFORNIA GAS COMPANY and PACIFIC LIGHTING SERVICE COMPANY for an order,

(a) determining and deciding pursuant to the jurisdiction conferred by Section 11592 of the California Water Code the character and location of new facilities required to be provided by the Department of Water Resources pursuant to Article 3, Chapter 6, Part 3, Division 6 of the California Water Code;

(b) directing and requiring the Department of Water Resources to provide and substitute such facilities of Applicants to be taken or destroyed by said department; or, in the alternative, to reimburse the Applicants for necessary costs incurred in the relocation of their facilities;

(c) determining and deciding all controversies between Applicants and the Department of Water Resources concerning the requirements imposed by Article 3, Chapter 6, Part 3, Division 6 of the California Water Code; and

(d) granting other appropriate and joint relief.

ORIGINAL

Application No. 53549
(Filed August 25, 1972)

OPINION AND ORDER GRANTING LIMITED REHEARING

On April 9, 1974, the Commission issued Decision No. 82699 whereby it ordered that applicants Southern California Gas Company (SoCal) and Pacific Lighting Service Company (PLS) reimburse the Department of Water Resources (DWR) for the costs of relocating applicants' natural gas pipelines which were previously located on

lands that became inundated by virtue of DWR's operation of its Pyramid Dam Project.[1/] On April 20, 1974 applicants filed a petition for rehearing and reconsideration of Decision No. 82699. By Decision No. 83067, dated June 25, 1974, the Commission stayed the effective date of Decision No. 82699 pending the disposition of the applicants' petition for rehearing. Upon further review of the applicants' petition, as well as the record in this proceeding, we have determined good cause for limited rehearing of Decision No. 82699 has been shown.

Applicants raise the following three issues in their petition:

(1) The federal permits upon which the Commission relied in Decision No. 82699 require relocation of applicants' pipeline at applicants' own cost only if the federally withdrawn lands upon which the pipelines were located were used for a federal power project. Since there is as yet no federal license for this project, the permits are not yet applicable.

(2) The California Legislature, by enacting Section 11590 of the Water Code, has required DWR to relocate the pipelines notwithstanding the federal permits.

(3) Even if the Commission's reliance on the federal permits is correct, applicants' need only pay the costs of removing the pipelines from federal lands. Since applicants relocated 5227 feet of pipeline from private lands, further hearings must be held to determine what portion of the cost of relocation must be borne by DWR.

1/ The Pyramid Dam and Pyramid Lake, Pyramid Power Complex, Castaic Dam and Castaic Lake and Castaic Powerplant are facilities of the West Branch Division (Kern and Los Angeles Counties) of the California Aqueduct. DWR has applied for a license from the Federal Power Commission (FPC) to operate the Pyramid Dam Project (Project No. 2426) as a federal water power project.

At the outset the Commission reaffirms its statements in Decision No. 82699 to the effect that it has jurisdiction pursuant to Section 11592 of the Water Code to determine the controversy between applicants and DWR. In this respect it should be noted that after the Commission ordered applicants to reimburse DWR for the costs of relocating the subject pipelines, DWR abandoned its prior contentions that the Commission lacked jurisdiction over the controversy between applicants and DWR.

Though the Commission has jurisdiction to determine the subject controversy, the major question raised by applicants' petition for rehearing of Decision No. 82699 is whether the Commission correctly decided that applicants are presently obligated to pay the costs of removing their pipelines from both private and federally withdrawn lands. To answer this question we must consider the present effect of the interim use permits executed between the federal government and applicants (or their predecessors) on Section 11590 of the Water Code.

I.

PRESENT EFFECT OF THE FEDERAL INTERIM USE PERMITS ON SECTION 11590 OF THE WATER CODE.

Applicants allege that the Legislature, in enacting Sections 11590 through 11592 of the Water Code, expressed its intent to have DWR pay for the cost of the relocation notwithstanding the interim use permits executed between the federal government and applicants or their predecessors. The Commission disagrees with applicants. Their contention ignores the language of Section 11590 which permits DWR to take or destroy a public utility's "line or plant" provided "the taking or destruction has been permitted by agreement" executed between DWR and the public utility.

In the present case applicants (or their predecessors) did not execute agreements directly with DWR. However, with respect to the 22-inch pipeline applicant SoCal agreed to hold the federal government, its permittees or licensees harmless from liability for the removal or relocation of improvements or structures constructed by the applicants which were found to be in conflict with power development on the federally withdrawn lands (Decision No. 82699,

mimeo, pages 9-10). As to the 26-inch pipeline the predecessor of applicant PLS "waive[d] all right to compensation for damages that may be caused to its property on power-site lands by future power development" (Id., pages 11-13). In return for their promises to the federal government SoCal and PLS received rights of way on these federally withdrawn lands. Since the routes across the federally withdrawn lands were shorter than alternate routes, applicants saved substantial construction costs. Based on ordinary principles of contract law once DWR becomes either a permittee or licensee of a FPC power project located on the subject federal lands, DWR is relieved from paying applicants for removing or relocating their pipelines.2/, 3/

2/ Though DWR has relied heavily on Section 24 of the Federal Power Act, 16 U.S.C. Section 818 as a basis for applicants' payment of the costs for relocating their pipelines, applicants' liability would be the same absent Section 24 in light of the above-described agreements. At pages 40 and 41 of its opening brief in the FPC proceeding (Exhibit 4 of DWR's Special Return by Way of Motion to Dismiss Application No. 53549), DWR itself states that applicants' permits were made subject to greater restrictions than those found in Section 24 of the Federal Power Act.

3/ In its pending FPC proceeding (Project No. 2426) DWR has asserted that applicants will have to pay for the costs of relocating their pipelines only after the FPC licenses the California Aqueduct as a federal power project. As it stated in its opening brief in the FPC proceeding:

> "Those restrictions [in the federal interim use permits] will require interveners to remove the lines they operate from withdrawn United States lands within the site of Pyramid Reservoir with compensation, when the Commission licenses the California Aqueduct, Project No. 2426." (Emphasis added.)
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> "Since Project No. 2426 is a water power development, we submit that unless the Commission [FPC] wishes to reverse forty years of established practice and procedure, it should act to trigger interveners' obligations to at their own sole cost remove their lines from the site of Pyramid Reservoir at the time it issues licensing for project No. 2426." (Emphasis added; Opening Brief of DWR in FPC Proceeding, Project No. 2426, pages 41, 74; Exhibit 4 of DWR's Special Return By Way of Motion to Dismiss Application No. 53549.)

Notwithstanding the above-quoted language the Commission thinks the above-described agreements obligate applicants to pay for the costs of relocating their pipelines from the federally withdrawn lands once DWR becomes either a permittee or licensee of Project No. 2426.

Even if the last proviso of Section 11590 did not exist, the above-described agreements between applicants and the federal government would prevent the Commission from finding that applicants' pipelines were taken or destroyed within the meaning of Section 11590, provided DWR was a permittee or licensee of a federal power project located on the federally withdrawn lands. By said agreements applicants (or their predecessors) waived any claim of a taking or destruction of these pipelines by a permittee or licensee of a FPC power project.[4/] Though the Legislature was concerned that utilities not be unreasonably burdened by DWR's projects, it is unreasonable to assume that the Legislature enacted Section 11590 with the intent of allowing monetary windfalls to utilities who had previously waived the right to compensation for the relocation or substitution of its facilities.

On January 14, 1972, a Presiding Administrative Law Judge of the Federal Power Commission (FPC) issued an initial decision declaring the Pyramid Dam Project to be a federal project and making DWR a licensee. However, the exceptions of applicants and other interveners to that decision prevented it from becoming a final decision of the FPC (18 CFR Sections 1.30(d)(3), 1.31). In Opinion No. 688, issued February 6, 1974, the FPC remanded the proceedings in Project No. 2426 for further hearings after the issuance of a final environmental impact statement by the FPC staff. Though the FPC in Opinion No. 688 specifically concluded that the facilities involved in the Pyramid Dam portion of Project No. 2426 required a FPC license, it did not grant a license for such facilities. On December 3, 1974, the FPC issued copies of its staff's draft

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4/ At this point it should be noted that in the controversy between DWR and Oroville Wyandotte Irrigation District (OWID) in Application No. 48869, no such federal permits were executed between OWID and the federal government. Further, both parties to that proceeding were FPC licensees, but the FPC specifically refused to determine the merits of the controversy between DWR and OWID regarding the financial responsibility for the substitute facilities required for OWID's Miners Ranch Canal. Therefore, the Commission reasserts its statement in Decision No. 82699 that Application No. 48869 and Application No. 53549 are distinguishable.

environmental impact statement. All comments regarding the draft were to be filed with the FPC by January 13, 1975. The FPC will not schedule dates for the reopened hearings in Project No. 2426 until the parties thereto have had ample time to prepare for cross examination of the staff's final environmental impact statement. As of this date the FPC staff has still not issued a final environmental impact statement. Also, as of this date the FPC has not issued a final decision in this matter. Therefore, DWR cannot claim that it is a licensee. The record also lacks any evidence that DWR is a permittee of the FPC. Before the Commission will require applicants to reimburse DWR for that portion of the costs of relocating applicants' pipeline from the subject federal lands, it must be shown that DWR is either a FPC permittee or licensee.

II.

ALLOCATION OF RELOCATION COSTS

According to applicants even if the Commission determines that the federal interim use permits are controlling in this case, those permits impose the relocation obligation on applicants only with respect to the federally withdrawn lands crossed by applicants' pipelines. Therefore, rehearing is necessary to determine DWR's financial liability for the relocation from private lands.

In its response to the petition for rehearing DWR attacks applicants' position on the grounds that applicants failed to raise the allocation issue previously in these proceedings and that applicants' contention is contrary to accepted condemnation principles. DWR argues

that relocation costs are in the nature of severance damages and to recover severance damages the owner must establish unity of title, physical contiguity and unity of use. Applicants allegedly did not possess unity of title with respect to its pipeline network. Therefore, they are not entitled to severance damages. In support of its contentions DWR cites Placer County Water Agency v. Jonas, 275 Cal. App. 2d 691 (1969).

DWR's contentions lack merit. The stipulation of facts between DWR and applicants specified that 5,227 feet of applicants' gas pipelines were located on private lands (Exhibit 1, paragraph 3). Prior to Decision No. 82699 applicants consistently argued that DWR should pay for the cost of relocating applicants' gas pipelines located on both federal and private lands. If the Commission accepted applicants' contention the issue of allocation would be moot. The issue of allocation became ripe only after the Commission, in Decision No. 82699, ordered applicants to pay for the relocation of its pipelines located on both federal and private lands. Applicants then raised the allocation issue in their petition for rehearing of Decision No. 82699.

Furthermore, prior to the issuance of Decision No. 82699, applicants may have been relying on the following language at page 52, mimeo, of the Initial Decision of the FPC Presiding Examiner in Project No. 2426:

> "At the hearings Counsel for DWR stated that DWR does not contest its liability for damages caused to the property of the Pipeline Interveners where such property is located on private lands or on

> lands of the United States not subject to prior withdrawal, and where the property rights of the Pipeline Interveners are superior to those claimed by DWR (Tr. 666-667). In fact, the record shows that DWR has negotiated a number of contracts with the Pipeline Interveners agreeing to reimburse such Interveners for the removal and relocation of sections of their lines where the conditions immediately above described were applicable. (See Exhibits 114, 115, 123)" 5/

The above-quoted language shows that DWR has taken inconsistent positions before the FPC and before this Commission regarding its liability for damages caused to applicants' property located on private lands. Absent any inconsistency DWR's arguments as to severance damages are still inapplicable herein. First, the Commission does not think relocation costs within the meaning of Section 11590 of the Water Code are in the nature of severance damages. Severance damages relate to land while Section 11590 relates to "lines or plants." (See 5 Witkin, Summary of California Law, (8th ed.), Constitutional Law, Sections 600 et seq.) Second, assuming arguendo that relocation costs are in the nature of severance damages, DWR incorrectly claims that applicants lacked unity of title. The facts clearly show that applicants owned the pipelines in question. It was the pipelines on the private lands and federally withdrawn lands that were taken or destroyed, not the lands themselves. Third, the Placer County Water Agency case, supra, relied on by DWR did not involve private lands. The issue in that case was whether the holder of a federal grazing permit had a compensable estate or interest in a particular parcel of federal land or in national forest property outside that particular parcel. In other words only federally owned lands were involved in the Placer County Water Agency case.

5/ The Initial Decision of the FPC Presiding Examiner was attached as Exhibit 1 of DWR's Special Return By Way of Motion to Dismiss Application No. 53549 and was incorporated as Exhibit M of the Stipulation of Facts (Exhibit 1) herein.

The language of the interim use permits between applicants (or their predecessors) and the federal government clearly limit applicants' waiver of compensation for damages to pipelines located on federally withdrawn lands used for power development. Therefore, we agree with applicants' contention that rehearing is necessary to determine what portion of the costs of relocation DWR is required to pay.

Since uncertainty still exists as to the time DWR is entitled to reimbursement, if ever, from applicants for the costs of relocating the portions of the pipelines located on federally withdrawn lands, the Commission will continue the stay of Decision No. 82699 ordered by Decision No. 83067.

Based on the foregoing,

IT IS ORDERED that:

1. Rehearing of Decision No. 82699 is hereby granted to the extent that applicants were therein ordered to reimburse DWR for the entire cost of relocating or removing its pipelines as a result of the operation of the Pyramid Dam and Reservoir.

2. Rehearing is granted for the following limited purpose: To determine the amount for which DWR is liable for the costs of relocating those portions of applicants' pipelines located on private lands notwithstanding the above-described federal permits.

3. Rehearing is to be held before such Commissioner or Examiner and at such time and place as may hereafter be designated.

4. The stay of Decision No. 82699 granted by the Commission in Decision No. 83067 is continued until further order of the Commission.

5. At such time as DWR becomes a FPC permittee or licensee with respect to Project No. 2426 it shall give written notice of such fact to the Commission. Upon receipt of said notice the Commission shall take appropriate action in conformance with the language of this decision.

6. Any findings of fact and conclusions of law in Decision No. 82699 that are inconsistent with this decision are inapplicable.

The Executive Director is directed to cause appropriate notice of rehearing to be mailed at least ten (10) days before such rehearing.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 29th day of JUNE, 1976.

President
William Symons, Jr.
Vernon L. Sturgeon
L. Ilos

Commissioners

Sabatini
Robert Batinovich

Commissioner

Commissioner D. W. Holmes, being necessarily absent, did not participate in the disposition of this proceeding.